IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO. 210 OF 1994

Shashikant Popatlal Patani ..Appellant

versus

1. Pandit Bhila Patil
2. Manik Ragho Patil
2A. Subhash Manik Sawant (Patil)
2B. Vasant Manik Sawant (Patil)
2C. Vijay Manik Sawant (Patil)
2D. Smt. Akkabai Koutik Shevale
2E. Smt. Mangalabai Promod Pawar ..Respondents

Mrs. Kiran Bhagalia for the Appellant.

Mr. R. M. Dethe h/f. R. G. Ketkar for the Respondents.

CORAM : D. G. DESHPANDE,J.

DATE : 14TH JANUARY,2005

ORAL ORDER :

1. Heard counsel for the Appellant and the Respondents.

2. This appeal is filed by the original

plaintiff who had filed suit for specific performance or in the alternative refund of consideration, which was dismissed. It was the case of the plaintiff that on 9.12.1981 the respondents executed an agreement for sale in respect of the suit land for Rs.52,500/- per acre. By 27.6.1982 the appellant had paid Rs.55,000/- to the Respondents. He was ready and willing to perform his part of the contract. He therefore gave notice to the respondents to make available to him marketable title of the land and to execute the sale deed, that was not done by the respondents and therefore he was compelled to file the suit. The claim of the plaintiff for specific performance as well as for return of consideration was rejected by the trial court. So far as the willingness of the plaintiff to perform his part of the contract, I do not find that the plaintiff has been able to make out any case except agreement dated 9.12.1981. The plaintiff was required to pay 1/4th of the total consideration on or about 7.4.1982. Admittedly he did not pay the amount.

3. The plaintiff gave first notice on 19.6.1985. This notice is given near about four years after the execution of the sale deed. It was alleged that there was a charge on this land and some name of one Rajabai P. Shrawan was there, she

was ready to execute the sale deed. In the reply notice the defendants showed their willingness to get the sale deed executed provided the plaintiff was ready and willing to pay the balance amount within eight days. Then again by another notice dated 6.7.1985 defendants showed their willingness. It was in these circumstances that the trial court rejected or disallowed the claim of the plaintiff for specific performance and I am not inclined to interfere because it is clear from the case of the plaintiff that he was not diligent about his rights on the basis of the agreement between the parties atleast for getting specific performance from the defendants. However, alternative submission and prayer of the appellant's Advocate that a decree for refund of consideration at least could have been passed by the trial court, in this regard she pointed out that in the absence of any recital in the agreement for sale in the reply notice and the written statement the plaintiff's claim for refund of consideration should have been awarded by the court.

4. Counsel for the respondents - defendants pointed out that in the agreement it was mentioned that if the plaintiff was defaulter in making payment, without there being any fault of the defendants then the plaintiff will be liable to

compensate the defendants.

5. Counsel for the appellant - plaintiff also pointed out that after entering into agreement with the plaintiff the defendant has entered into agreement for purchasing another land but because of the failure of the plaintiff to pay the amount as agreed the defendants agreement with third party was required to be cancelled and therefore the defendants suffered loss. This submission could have been accepted if had there been any evidence on record but the defendants did not examine themselves and therefore the defence of the defendants becomes totally weak without there being any support. However, my attention was drawn by the counsel for the defendants to the admission given by one of the witness of the plaintiff, viz. P.W. No.4 Chandanmal Kesharmal Sancheti who was the middleman in the transaction and witness to the agreement. P.W. 4 Chandanmal has stated that Dr. Satish Gujrathi who was the constituted attorney of the plaintiff told the witness twice that as the constituted attorney does not want to complete the transaction even if the earnest money is forfeited by the respondents - defendants. Counsel for the respondents therefore contended that this admission given by the witness of the plaintiff prove that the plaintiff was not willing to perform his part of the

contract and therefore claim for refund of consideration should not be accepted.

6. It is difficult to accept the submission of counsel for the respondents, P.W. 4 may be a witness to the transaction, but the admission is not given either by the plaintiff or the C.A. If something is told to the witness by Dr. Satish Gujrathi that cannot be construed as admission by the plaintiff. Therefore, this piece of evidence or admission will not hold the defendants in negating the claim of the plaintiff for refund of consideration.

7. Considering that the amount paid by the plaintiff to the defendants is about Rs.55,000/=. It appears that the plaintiff did not pay 1/4th share as agreed within the stipulated period but then the defendant accepted Rs.15,000/= after the stipulated period waiving his right, if any, of forfeiture. However, it is equally true that the defendants can be said to have suffered loss because of the refusal of the plaintiff to perform his part, the defendants are required to be adequately compensated and therefore, I pass the following order:

ORDER

. Appeal is partly allowed. The suit of the plaintiff is decreed partly for refund of consideration of Rs.45,000/= with interest at the rate of 6% per annum from the date of decree of the lower court till realisation, with proportionate costs thereon.

14.1.2005 (D.G. DESHPANDE,J.)